Supreme Court, U.S.
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No. _____

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RELIGIOUS TECHNOLOGY CENTER,

Petitioner,

—v.—

DELL LIEBREICH, Individually and as Personal Representative of the Estate of Lisa McPherson,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1291, providing for appellate jurisdiction in the courts of appeals "from all final decisions of the district courts," required the court of appeals to decide petitioner's cross-appeal from a final judgment dismissing its tort claim against respondent in her individual capacity?

2. Whether the court of appeals fundamentally departed from the jurisprudence of the Court and other courts of appeals in holding that the Due Process Clause forbids a district court's exercise of specific jurisdiction over a foreign defendant that has performed every act giving rise to the litigation within the forum, merely because the foreign defendant has not additionally "purposefully directed" those acts at the forum?

3. Whether the court of appeals' holding that a Texas federal district court lacks general jurisdiction over a personal representative of a Florida estate where the representative lives in the forum district, was served there, and performs all her representative duties there, including the acts giving rise to the lawsuit, is contrary to the Court's decisions in *Perkins v. Consolidated Mining Co.*, *Burnham v. Superior Court*, and *Pennoyer v. Neff*?

PARTIES TO THE PROCEEDINGS BELOW

The parties listed in the caption were parties in the proceedings below. In addition, Thomas J. Dandar and Kennan G. Dandar ("the Dandars"), respondent's attorneys, were also parties to one of the consolidated appeals in which they appealed from the district court's order sanctioning them for violations of 28 U.S.C. § 1927. The court of appeals in that appeal, No. 02-40783, vacated the sanctions order and remanded to the district court for further consideration, as more fully described herein. Petitioner thus believes that the Dandars have no personal interest in the outcome of this petition.

CORPORATE DISCLOSURE STATEMENT (Rule 29.6)

Petitioner is a not-for-profit non-stock religious corporation. It has no parent or subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Religious Technology Center ("RTC") petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit, which were entered on July 22, 2003 (1a, 3a).[1]

OPINIONS BELOW

The opinion of the court of appeals (7a) is reported at 339 F.3d 369. The order denying petitioner's petition for rehearing and rehearing en banc (20a) is unreported. The relevant opinions of the district court (29a-67a) are unreported.

JURISDICTION

The court of appeals' judgments were entered on July 22, 2003 (1a-6a). Timely petitions for rehearing and rehearing en banc were denied on August 19, 2003 (20a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

The Due Process Clause of the Fourteenth Amendment to the Constitution provides in relevant part: "No state

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[1] References to (___a) are to the appendix to this petition, *infra*.

shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT

On December 5, 1995, Lisa McPherson, a Florida resident and long-time member of the Church of Scientology, died of a pulmonary embolism. At the time of the embolism, Lisa was participating in a religious practice at her church, the Church of Scientology Flag Service Organization (the "FSO Church"). Lisa died intestate and was survived by her mother, Fannie McPherson, a resident of Texas, as her only statutory heir (R. 314).[2]

One year later, Fannie died and in February 1997, Dell Liebreich, a resident of Texas, who was Fannie's sister and Lisa's aunt (R. 157), was appointed as the personal representative of Lisa's Estate (R. 454). On or about February 19, 1997, Liebreich, acting through the two-attorney Tampa, Florida firm of Dandar and Dandar, P.A. ("Dandar"), filed a wrongful death lawsuit on behalf of the Estate against the FSO Church in Florida state court (R. 2, ¶ 5).

The 1997 Agreement

Within months after filing the wrongful death case in Florida, Liebreich, through Dandar, expressed concern that the Church's assets would not be sufficient to satisfy a potential judgment. Consequently, she threatened to add other Scientology-related entities as additional defendants, including the petitioner Religious Technology Center ("RTC") and David Miscavige, RTC's Chair-

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[2] References to "R.___" are to the Record in the court of appeals. References to "R.E.___" are to the Record Excerpts filed by RTC on its cross-appeal in the court of appeals in case number 02-40783.

man of the Board and the religion's worldwide ecclesiastical leader (52a). This threat was resolved in a private, non-judicial 1997 Agreement between Liebreich, for the Estate, and the FSO Church under which the latter agreed not to sell or encumber certain of its real estate holdings. In consideration for that agreement, Liebreich agreed "not [to] amend her complaint to add, nor otherwise seek to include, as party defendants . . . Religious Technology Center . . . and any officer, director, agent or employee of [RTC]" (R. 7-8).

Liebreich participated in the negotiations of the terms of the 1997 Agreement from her home in Texas, approved the final terms from her home in Texas, and signed the contract in Texas, as the Estate's personal representative (R. 200-02, 515, 1216-1217).

The Two Breaches of the 1997 Agreement

Despite the plain language of the 1997 Agreement, Liebreich, acting from Texas, caused the Estate to breach it twice. First, on September 7, 1999, the Estate, at Liebreich's direction, filed a motion to add five Scientology-related parties (3 individuals and 2 corporations), including RTC and Mr. Miscavige, to the wrongful death case (R. 408-16). The FSO Church vigorously resisted and Liebreich's motion was denied (R. 418-22).[3]

Liebreich then committed a second breach when, on November 19, 1999, from her home in Texas, she caused and directed the Estate once again to move the Florida

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[3] The FSO Church filed an action in Florida state court against the Estate for breach of contract and against Liebreich personally, for causing, directing and inducing the breach. Significantly for purposes of the instant petition, on three separate occasions, the Florida court, applying Florida law, rejected Liebreich's attempts to dismiss or obtain summary judgment on the tortious interference action against her for the first contract breach.

court for leave to amend her complaint in the wrongful death case to add Mr. Miscavige as a defendant (R. 1302-24). While the Florida wrongful death court granted Liebreich's motion to amend on December 3, 1999, explaining that it was doing so only because of Liebreich's claims that the statute of limitations was about to expire, it reserved a final ruling on whether adding Mr. Miscavige as a defendant violated the 1997 Agreement (R. 1321).

Recognizing that Mr. Miscavige was targeted by Liebreich solely because he was the Chairman of the Board, RTC's Board of Directors resolved to pay the legal fees in defending him in the wrongful death case. Mr. Miscavige was ultimately successful in obtaining a dismissal of the claims made against him in that action (R. 50-51). In defending its Chairman, RTC incurred substantial attorneys' fees and costs (R. 2431-32).

The Proceedings in the Texas District Court Below Stemming from the Second Breach

On August 15, 2000, RTC, as a third-party beneficiary to the 1997 Agreement, filed this diversity action[4] in the United States District Court for the Eastern District of Texas against Dell Liebreich, as representative of the Estate, for the second breach of that contract (R.E. 50). RTC also asserted a claim against Liebreich individually for tortiously interfering with the 1997 Agreement (R. 4-6; R.E. 53-55). The parties stipulated that Florida law applied to the Texas action (R. 9).

RTC personally served Liebreich by hand at her home in Yantis, Texas, and alleged that Liebreich, as personal

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[4] *See* 28 U.S.C. § 1332(a). RTC is a California corporation. Liebreich, in her personal capacity, is a citizen of Texas, and in her representative capacity, a citizen of Florida. Thus, total diversity existed (57a).

representative, had performed all her official duties in Texas, including the specific acts that caused the breach of contract. The district court found that it had personal jurisdiction over Liebreich in her representative capacity, because all her acts on behalf of the Estate were performed in Texas, and individually as a resident of Texas (59a-60a).

Just as she unsuccessfully had attempted to do three times in the Florida courts, Liebreich moved to dismiss the tortious interference claim against her in her personal capacity, asserting to the district court below the exact same legal arguments under Florida law and offering the same Florida precedents that had been rejected by two Florida judges. The district court, however, refused to follow the Florida court's rulings on whether the claim stated a basis upon which relief could be granted under Florida law, and entered an Order dismissing RTC's tortious interference claim (R. 509-22; R.E. 30-43).[5]

The case proceeded on RTC's breach of contract claim against the Estate. By Order dated March 19, 2001 (48a), the district court granted RTC partial summary judgment determining the Estate's liability for the second breach

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[5] Soon after the district court's ruling, Liebreich admitted in her deposition that she fully understood that the 1997 Agreement precluded the Estate from seeking to add Mr. Miscavige to the wrongful death action; that she knew the Estate would not receive any benefit, financial or otherwise, by suing Mr. Miscavige, a religious leader with little or no personal assets; and, critically, that she well expected to be sued for breach of contract as a result of her actions. Liebreich also admitted her personal animosity toward the Scientology religion and its leaders and her desire to punish them. Based on these deposition admissions, RTC moved to amend its complaint, alleging that Liebreich's admissions were more than sufficient to "cure the pleading deficiencies perceived by the Court in its October 20 Order" dismissing the tortious interference claim. On March 19, 2001, the district court denied RTC's motion without explanation (47a).

of contract. RTC's damages arising from the breach of the Agreement were tried to a jury. On January 25, 2002, a jury found RTC's damages to be $258,697.11 (45a). On March 6, 2002, the district court entered judgment on this verdict, assessing $258,697.11 in damages and $49,955.76 in prejudgment interest against Dell Liebreich, in her capacity as personal representative of the Estate (*Id.*). In a separate order and judgment, the district court awarded RTC $327,654.00 in attorneys' fees incurred for prosecuting the Texas action pursuant to the Agreement's prevailing party attorneys' fees provision (31a, 44a). The court assessed $98,296.00 of this attorneys' fees award against the personal representative's counsel, Thomas and Kennan Dandar, pursuant to 28 U.S.C. § 1927, for unreasonably and vexatiously multiplying the proceedings (29a, 33a, 44a).

Liebreich, in her representative capacity, and her counsel each appealed from the final judgments. RTC cross-appealed from the dismissal of its tort claim against Liebreich personally.

The Court of Appeals' Decision

On July 22, 2003, the court of appeals reversed the judgment for breach of contract on the ground that the district court lacked personal jurisdiction over Liebreich in her representative capacity (9a). The court did not decide RTC's cross-appeal from the district court's judgment dismissing the tortious interference claim against Liebreich in her personal capacity. Despite the fact that the court explicitly acknowledged that the district court had personal jurisdiction over Liebreich in her *personal* capacity (15a), and recognized that RTC had filed a cross-appeal on its tort claim (13a), the court inexplicably and inaccurately stated that "[a]ll three of the appeals at bar stem from rulings entered by the dis-

trict court in the course of adjudicating the breach of contract claim" and incorrectly concluded that its decision on personal jurisdiction *over the Estate* resolved all three appeals (9a, n.2). The court thus also vacated, without analysis or discussion, the sanctions award against the Dandars and their law firm, despite the district court's unreversed holding that they vexatiously multiplied the proceedings in violation of 28 U.S.C. § 1927 (9a, 13a).

In its analysis of the jurisdictional issue, the court of appeals recognized that the Texas Long Arm Statute reaches to the full extent of the Due Process Clause (14a) (citing Tex. Civ. Prac. & Rem. Code Ann. § 17.041 (Vernon 2001) *et seq.*; *Gessmann v. Stephens*, 51 S.W.3d 329, 335 (Tex. App. 2001)) (other citation omitted). The court held that the district court "impermissibly imputed [the] general personal jurisdiction [over Liebreich as a resident of Texas] to the Estate" (15a).[6] Although Liebreich "signed a retainer letter in Texas, received and distributed property from the Estate in Texas, and participated in decisions concerning the Florida litigation while she was in Texas," the court of appeals held that "[n]one of the activities individually constitutes a substantial or meaningful contact with Texas, Texas law, or Texas residents, and certainly considered *in toto* they fail to amount to continuous and systematic contact with Texas such that general jurisdiction is created" (16a) (citations omitted).

The court of appeals also analyzed whether specific jurisdiction over the Estate existed, stating the test as follows: "Specific jurisdiction may be found when a foreign defendant has purposefully directed his activities at

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[6] Because the Estate was a creature of Florida's probate regime, it resided in Florida (15a).

residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities" (17a) (internal quotations and citations omitted). The court recognized that Liebreich had negotiated and signed the contract while in Texas,[7] but brushed aside these activities as insufficient contacts with the forum state because "neither of these acts were [sic] directed at residents of the forum state, or at the forum state itself" (*id.*).

The court of appeals further stated that "the physical location of Liebreich at the time she signed the agreement and participated in negotiations on behalf of the Estate is not especially relevant in the analysis" (18a). According to the court, Liebreich's location "lacks the significance it might otherwise have" since she was acting on behalf of "an entity whose 'physical presence' was in Florida" (*id.*, n.5). Moreover, the court noted that this Court has "rejected a formalistic rendering of minimum contacts," focusing instead on "the degree that a nonresident defendant has reached out and availed himself of the foreign venue" (*id.*). Thus, notwithstanding that Liebreich lived in Texas, carried out all her duties as personal representative in Texas, and performed all of the activities regarding the negotiation, formation, and breach of the contract in Texas, the court held that no specific personal jurisdiction existed because the Estate contracted exclusively with non-Texas residents, did not invoke Texas law, and therefore "did not reach out to Texas, nor did it direct its contract-related activities toward Texas" (*id.*).

Under Fifth Circuit rules of procedure, RTC filed separate petitions for panel rehearing and clarification and for rehearing en banc, emphasizing, *inter alia*, that

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[7] Liebreich also breached the contract while in Texas (R. 165).

RTC's cross-appeal, which the court had failed to decide, arose from RTC's *tort* claim against Liebreich in her individual capacity, and thus was not resolved by the court's holding that the district court lacked jurisdiction over her in her representative capacity. The court denied the petitions for rehearing and clarification and rehearing en banc (22a). In doing so, the panel nevertheless "clarif[ied]" that it did not reverse the sanctions award, but merely vacated and remanded it (*id.*).[8] The court of appeals ignored the portion of RTC's petitions that emphasized that the court inexplicably had failed to decide or to address RTC's cross-appeal from the dismissal of its tort claim.

REASONS FOR GRANTING THE WRIT

This petition raises issues at the heart of the federal judicial system: a court of appeals' duty to decide an appeal brought under 28 U.S.C. § 1291, and the power of district courts to exercise jurisdiction over cases arising from a defendant's activities carried out in the forum state. On both issues, the court of appeals opinion reflects an alarming misunderstanding of the federal courts' responsibilities and reach.

The statutory right to an appeal means very little if courts of appeals can decline to decide appeals clearly within their jurisdiction. Here, the court of appeals explicitly acknowledged that the district court "had general personal jurisdiction over Liebreich [in her personal capacity] as a resident of Texas" (15a). It also expressly recognized that RTC had filed a cross-appeal from the

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[8] Compounding this confusion, on remand, the district court refused to consider reinstating the sanctions award, apparently on the erroneous ground that the court of appeals' decision precluded it from doing so (66a). RTC has now appealed that order to the Fifth Circuit.

district court's dismissal of its tortious interference claim against Liebreich in her personal capacity (13a). Indisputably, then, pursuant to 28 U.S.C. § 1291, the court of appeals had jurisdiction to decide RTC's cross-appeal. Instead, the court of appeals inexplicably failed to exercise that mandatory jurisdiction even after RTC petitioned for rehearing (22a). This failure constituted a dramatic departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

The court of appeals also fundamentally misconstrued the Court's jurisprudence regarding personal jurisdiction. Turning the Court's precedent on its head, the court of appeals held that the district court unconstitutionally, *i.e.*, in violation of due process, exercised personal jurisdiction over the respondent in her representative capacity even though respondent performed all her duties as personal representative, including *every activity that gave rise to this action, in the forum state* (17a). The Fifth Circuit's understanding that "physical location . . . is not especially relevant" (18a) when analyzing specific jurisdiction conflicts with this Court's and other circuits' precedent and dramatically contracts a plaintiff's forum choices without furthering the aims of the Due Process Clause.

I. The Court Should Exercise Its Supervisory Power to Compel the Fifth Circuit to Decide RTC's Cross-Appeal

The right to appeal a civil court judgment has been an essential part of the federal judicial system from its inception.[9] In 1891, Congress enacted the Evarts

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[9] *See* Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, Tenn. L. Rev. 605, 611 (2003) (citing Jus-

Act, establishing the circuit courts of appeals and providing for an appeal of right from final district court judgments.[10]

Over time, the right to appeal final judgments of the district courts to the courts of appeals has become so embedded in our system of law, including the expectation of our citizens, that it now has acquired a constitutional dimension, as an essential element of the rule of law and of due process.[11] At the least, the statutory right to appeal must be zealously protected.

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tice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1, 6 (1986)); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 Wisc. L. Rev. 11, 19 (citations omitted).

[10] *See* Richard H. Fallon, Jr., et al., *Hart & Wechsler's the Federal Courts and the Federal System* 1636 (4th Ed. 1996) (citing Act of Mar. 3, 1891, 26 Stat. 826). Prior to the Evarts Act, under the judicial scheme established by the First Judiciary Act, appellate functions were carried out by the Supreme Court and by circuit courts, which held two sessions each year in each district within the circuit and which were composed of a district judge from that circuit and two Supreme Court justices. *See id.* at 28-29, 32. "Long before 1891 . . . it was acknowledged that the circuit courts were ill-equipped for the performance of appellate duties and that reviewing both the circuit and the district courts placed an intolerable burden on the Supreme Court." *Id.* at 1636.

[11] *See, e.g.*, Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62, 62 (1985) ("Although its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct.") (footnote omitted); ABA Comm. on Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10, commentary at 12 (1977) ("The right of appeal . . . is a fundamental element of procedural fairness as generally understood in this country."); Paul D. Carrington, *Crowded Dockets & the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 551 (1969) ("Review is . . . essential to the goal of law."); *In re Petersen*, 138 Wash. 2d 70, 96 (1999) (en banc) (Sanders, J. dissenting ("Whatever rights may be truly fundamental to the rule of law in a free society, the right to appeal must surely rank among them.").

Unless common words do not mean what they appear to say, the right to appeal final decisions of the district courts necessarily encompasses the right to a meaningful opportunity to be heard, and to a decision addressing the issue raised in the appeal. 28 U.S.C. § 1291, providing for jurisdiction in the court of appeals "from all final decisions of the district courts of the United States," *requires* the courts of appeals to *consider* and *decide* these appeals. Otherwise an appeal of right would mean nothing.

The Fifth Circuit's failure to decide RTC's appeal in this case is contrary to established law.[12] The Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress," highlighting the obligatory nature of 28 U.S.C. § 1291. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996 (citations omitted); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976) (calling the duty of a federal court to exercise its given jurisdiction a "virtually unflagging obligation") (citations omitted); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its

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[12] The appeal that the Fifth Circuit here failed to decide concerned no frivolous issue, but one on which the district court below and a Florida circuit court starkly disagreed. *Compare* the district court's opinion (64a) (holding that plaintiff could not assert a tortious interference claim against Liebriech in her personal capacity) *with* the decision of the Florida circuit court (R. 1658-62, 2767-68) (denying Liebreich's motions to dismiss and for summary judgment on tortious interference claim arising out of same contract and virtually identical acts). Moreover, the Florida court, in deciding this issue in accord with the petitioner's contention before the Fifth Circuit, was interpreting its own state's law.

duty to take such jurisdiction.") (internal quotations and citation omitted).

To that end, the Court has directed the use of the mandamus power "to confine an inferior court to a lawful exercise of its prescribed jurisdiction *or to compel it to exercise its authority when it is its duty to do so.*" *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (emphasis added); *Will v. United States*, 389 U.S. 90, 95 (1967). In *La Buy v. Howes Leather Co.*, for example, the Court affirmed a court of appeals' issuance of mandamus when the district court's order referring important issues in the case to a special master, "amounted to . . . an abdication of the judicial function depriving the parties of a trial before the court . . . ." 352 U.S. 249, 256 (1957); *see also Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1088 (3d Cir. 1993); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987).

In *Matter of McLinn*, the Court of Appeals for the Ninth Circuit, sitting en banc, considered the proper standard of review of district court determinations regarding state law. *See* 739 F.2d 1395 (9th Cir. 1984). The court held that it would be "an abdication of [its] appellate responsibility" if it gave "less than full independent de novo review" to such determinations because "[e]very party is entitled to a full, considered, and impartial review of the decision of the trial court." *Id.* at 1398; *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) ("[A] party is entitled to a single appeal . . . in which claims of district court error at any stage of the litigation may be ventilated.") (citation omitted).

The court in *McLinn* also recognized its "appellate duty to the parties to make a correct, independent *determination* . . . ." 739 F.2d at 1398 (emphasis added); *see also* Jeffrey O. Cooper & Douglas A. Berman, *Passive*

Virtues & Casual Vices in the Federal Court of Appeals, 66 Brook. L. Rev. 685, 732 (Winter 2000/Spring 2001) ("Pursuant to its jurisdictional mandate, [a court of appeals] must decide the case before it."); Carl Tobias, *The New Certiorari & A National Study of the Appeals Courts*, 81 Cornell L. Rev. 1264, 1286 n.90 (1996) (asserting that the goal stated in Fed. R. Civ. P. 1 of "the just, speedy, and inexpensive *determination of every action*" "should be equally applicable to appellate procedure") (emphasis added).

The fulfillment of this latter duty is facilitated by the structure of the court of appeals, namely the three-judge panel and a collaborative, deliberative decision-making process. *McLinn*, 739 F.2d at 1398. It is also noteworthy that the responsibility of making correct, independent determinations implicates courts of appeals' central error-correction function,[13] the appellate function "which is the prime consideration of the parties." *Id.* at 1401; *see also* Cooper & Berman, 66 Brook. L. Rev. at 715-16.

Part and parcel of the appellate courts' duties to make independent and correct determinations, moreover, is the obligation "to examine and assess every claim of error asserted to them." *See* Cooper & Berman, 66 Brook. L. Rev. at 715-16. "[U]nless an appeal raises multiple issues, resolution of any one of which would represent a full disposition of the appeal, a circuit court is not at liberty to pick and choose among the issues presented." *Id.* at 717. Relatedly, the Court has indicated that the courts of appeals have a duty to provide an explanation for their decisions. *See Will v. United States*, 389 U.S. 90,

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[13] The other main purpose of the courts of appeals is "the institutional function of announcing, clarifying, and harmonizing the rules of decision employed by the legal system in which they serve." *Matter of McLinn*, 739 F.2d at 1401 (citing Paul D. Carrington et al., *Justice on Appeal* 2-3 (1976)).

107 (1967) (vacating court of appeals' writ of mandamus when court failed to provide any explanation for its issuance).

The court of appeals' failure to decide RTC's cross-appeal cries out for correction pursuant to the Court's supervisory powers. "The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system . . . ." *Frazier v. Heebe*, 482 U.S. 641, 647 n.7 (1987). The Court has not hesitated to exercise its supervisory power when a court of appeals has not acted in accord with the "broad requirements of judicial power and its proper exercise." *Barr v. Matteo*, 355 U.S. 171, 172-73 (1957) (per curiam) (granting certiorari and vacating and remanding case to the court of appeals with directions to pass upon a claim it refused to consider); *Frazier*, 482 U.S. at 645-46 & n.4 (holding, "[p]ursuant to [its] supervisory authority," that the Eastern District of Louisiana could not adopt local rules that required state bar members applying for admission to live or maintain an office in Louisiana).

Just last term, in *Nguyen v. United States*, ___ U.S. ___, 123 S. Ct. 2130, 2136 (2003), the Court observed that in prior cases, it had exercised its supervisory power "to correct . . . violations of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business,' " even where "the defect was not raised in a timely manner." *Id.* (citation omitted). Here, petitioner timely brought the court of appeals' error to its attention in its motions for rehearing, but the court of appeals declined to correct its failure to decide RTC's cross-appeal.

The longstanding statutory right to appeal in a civil case means nothing if the courts of appeal abrogate their mandatory jurisdiction by refusing to decide appeals

arbitrarily. The Court remarked in *La Buy* that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259-60. Likewise, here, where the court of appeals has abdicated an essential duty, certiorari should be granted in furtherance of the Court's supervisory function.

II. The Fifth Circuit's Test for Specific Jurisdiction Misconstrues this Court's Precedents and Conflicts with Other Circuits

The Fifth Circuit properly recognized that the Texas Long Arm Statute reaches to the full extent allowed by due process (14a). The question thus presented is whether the federal Due Process Clause prohibits a Texas court from exercising personal jurisdiction over a Texas resident, hand-served in Texas, for acts wholly committed in Texas, when acting in her representative capacity for a non-resident Estate.

The court of appeals' test for specific jurisdiction reflects a grave misunderstanding about the proper reach of a court, a misunderstanding that entails serious consequences for both potential plaintiffs, whose forum choices have shrunk considerably, and potential defendants, who will have increased difficulties structuring their affairs to account for predictable litigation risks. The court of appeals articulated its unduly narrow test for specific jurisdiction as follows: "[s]pecific jurisdiction may be found when a foreign defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities" (17a) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)) (internal quotations and other citations omitted). The court of appeals thus turned on its head the test for

determining long-arm jurisdiction for acts *outside* the forum state but which are *directed back to* the forum state, and applied it in a reverse fashion to deny the district court's rightful jurisdiction over acts committed *in* the forum state. In spite of the fact that the Estate's personal representative was physically in the forum when she performed every act relating to the formation and breach of the contract underlying the action (and was hand-served within the forum, where she resides), the Fifth Circuit rejected the district court's exercise of specific jurisdiction because "the Estate did not reach out to Texas, nor did it direct its contract-related activities toward Texas. It did not contract with Texas residents nor did it avail itself of Texas law in the formation of the contract" (18a).

While the court of appeals correctly stated *one* ground upon which courts properly may exercise specific long-arm jurisdiction, it failed to apply the central—as well as more obvious and less amorphous—basis for specific jurisdiction: that the activities giving rise to the litigation *occurred in* the forum state. "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). When an entity has exercised that privilege, it does not make sense also to require, as did the court of appeals, that its conduct be "directed at residents of the forum state, or at the forum state itself" (17a). The fact that Liebreich, as the Estate's personal representative, *purposefully chose* Texas as the State in which to conduct the Estate's activities is more than enough. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (holding that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of *conducting activities* within the forum State . . . .") (emphasis added).

Not only did the court of appeals reject the most basic ground for exercising specific jurisdiction, it went one step further. Noting that this Court "has rejected a formalistic rendering of minimum contacts," the court of appeals reasoned that "the physical location of Liebreich at the time she signed the agreement and participated in negotiations on behalf of the Estate is not especially relevant in the analysis" (18a) (notably omitting that the breach occurred in Texas as well). This contradicts *Burger King*, where the Court stated that presence within the forum "frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there . . . ." 471 U.S. at 476.

It is true that territorial presence is not always essential to the exercise of specific jurisdiction because, in modern commerce, business is often "transacted solely by mail and wire communications across state lines." *Id.* But it is only in the context of such *out-of-forum* activities, where the Court analyzes whether such activities can be construed as minimum contacts *within the forum state*, that the "purposefully directed" inquiry becomes relevant: "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984)) (other citations omitted); *see also Hanson*, 357 U.S. at 251 (distinguishing the case from others where specific jurisdiction had been found because "[t]he cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State."); *Burnham v. Superior Court*, 495 U.S. 604, 626-27 (1990) (plurality opinion) (Scalia, J.) (distinguishing between the traditional basis for jurisdiction, "physical presence" and cases at "the margins" involving "*non*traditional forms of jurisdiction

newly adopted by the States") (emphasis in original); Flavio Rose, *Related Contacts & Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545, 1554 (1994) ("Acts physically performed in the forum are contacts. Acts performed outside the forum are also contacts when the defendant has performed them with some degree of awareness that the acts would have an effect in the forum.") (citation omitted).

In enunciating its test for exercising specific jurisdiction, the Fifth Circuit routinely and incorrectly omits a defendant's performance in the forum of the acts giving rise to the litigation as a ground for its exercise. *See, e.g., Central Freight Lines Inc. v. APA Transport Corp.*, 322 F.3d 376, 381 (5th Cir. 2003); *see also Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000).

Other circuits clearly recognize the relevance of the location of a defendant's specific acts to specific jurisdiction analysis and do not require that substantial (*i.e.*, more than "minimal") activities occurring in the forum state be additionally "directed" at it. *See, e.g., Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 62 (1st Cir.) (finding one defendant's presence in the forum state to negotiate the contract underlying the action probably sufficed in and of itself to support specific jurisdiction), *cert. denied by Scruggs v. Daynard*, 537 U.S. 1029 (2002); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002) (stating that "the defendant must purposefully avail himself of the privilege of *acting in* the forum state *or* causing a consequence in the forum state") (emphasis added) (internal quotations and citation omitted); *Minnesota Mining & Mfg. Co. v. Nippon Carbide Indus.*, 63 F.3d 694, 698 (8th Cir. 1995) ("[T]he defendant has purposefully availed itself of the privilege of conducting

activities within the forum and has made a contract in that forum. These contacts, which become the subject matter of a subsequent cause of action, may serve as the basis of jurisdiction."); *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) ("We have held that the 'purposeful availment' requirement is satisfied if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents."); *NUCOR Corp. v. Aceros y Maquilas de Occidente, S.A.*, 28 F.3d 572, 581 (7th Cir. 1994) ("This circuit and others have found that a defendant's participation in substantial preliminary negotiations conducted in the forum state leading to the contract in issue is a sufficient basis for personal jurisdiction.") (citations omitted); *see also Chew v. Dietrich*, 143 F.3d 24, 28, 30 (2d Cir. 1998); *Grand Entm't Group Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir. 1993); *Taylor v. Phelan*, 912 F.2d 429, 432-33 (10th Cir. 1990) (per curiam).

The Fifth Circuit's holding that the location of the Estate's personal representative while performing the acts that gave rise to the litigation was irrelevant rested at least in part on the fact that Liebreich "was at the time representing an entity whose 'physical presence' was in Florida" (18a, n.5). This holding not only is contrary to established law in other circuits, but has major ramifications for parties suing corporations and other intangible entities that can only act through their agents. By discounting Liebreich's activities in Texas on account of the fact that the entity for which she acted resided in another State, the Fifth Circuit has indicated that the contacts established by authorized agents need to be weightier than the contacts that would be required of the principals themselves. Due process does not require such an ill-advised insulation of corporate conduct.

No lesser authority than *International Shoe Co. v. Washington* recognized that, in assessing whether a nonresident corporation has established minimum contacts, it is necessary to look at the activities of its agents. 326 U.S. 310, 316 (1945). In this context, the *International Shoe* Court proclaimed that it "has never been doubted," that the demands of the Due Process Clause are met when the "*activities of the corporation's agent within the* state . . . . have not only been continuous and systematic, but also give rise to the liabilities sued on . . . ." *Id.* at 317 (emphasis added).

Other circuits have recognized the role that an entity's agents play in the jurisdictional analysis. *See, e.g., Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 55 & n.8 (1st Cir.) ("For purposes of personal jurisdiction, the actions of an agent may be attributed to the principal.") (citations omitted), *cert. denied by Scruggs v. Daynard*, 537 U.S. 1029 (2002); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir. 1984) (recognizing that "a corporation can act only through its agents" and finding the defendant corporation amenable to suit based on the conduct of its authorized representative); *Grand Entm't Group Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir. 1993); *Taylor v. Phelan*, 912 F.2d 429, 433 (10th Cir. 1990) (per curiam); *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990). The Fifth Circuit's isolated and myopic view should be soundly repudiated.

III. The Fifth Circuit's Test for Specific Jurisdiction Undermines the Policies Underlying the Due Process Clause

The Court has repeatedly iterated the policies of fairness, predictability, and federalism underlying the Due Process Clause's role in personal jurisdiction analysis. The court of appeals' unprecedented holding that the

location of a defendant's conduct is irrelevant for specific jurisdiction analysis simultaneously reduces a plaintiff's forum choices while retarding these policies.

Perhaps the foremost purpose for due process limitations on personal jurisdiction is the desire for predictability in our legal system such that "individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign," thus allowing them "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (internal quotations, citations and alteration omitted); *see also World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (stating whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" is "critical to due process analysis") (citations omitted); *Burnham v. Superior Court*, 495 U.S. 604, 626 (1990) (plurality opinion) (Scalia, J.) (describing "uncertainty and litigation over the preliminary issue of the forum's competence" as "evils"); *Shaffer v. Heitner*, 433 U.S. 186, 217-18 (1977) (Stevens, J. concurring in judgment).

Defendants who have purposefully conducted activities within a state should "reasonably anticipate" that those activities may give rise to litigation within that forum. *Burger King*, 471 U.S. at 474-75 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *id.* at 475-76 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984)); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("[S]o far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."). Due process is retarded,

not fostered, by injecting an uncertain inquiry into whether in-forum conduct giving rise to litigation is "purposefully" directed at the forum or outside the forum. As with jurisdiction based upon service of a defendant in a forum, jurisdiction here rests on "the ground of jurisdiction that has hitherto been considered the very baseline of reasonableness, physical presence." *See Burnham*, 495 U.S. at 626 (plurality opinion) (Scalia, J.) (deriding open-ended jurisdiction inquiries where rules can be certain and clear).

The grayness that the Fifth Circuit has now infused in a previously open-and-shut inquiry benefits no one. Potential defendants will have a more difficult time structuring their activities efficiently. Potential plaintiffs will have fewer forum choices and greater uncertainty about where they may properly bring actions. Both litigants and the court system will suffer for the "expensive and unnecessary disputes" the Fifth Circuit's rule is sure to engender. *See* Flavio Rose, *Related Contacts & Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545, 1586-87 (1994).

This case embodies these concerns. Liebreich easily could have avoided specific jurisdiction in Texas in her capacity as personal representative had she not acted on the Estate's behalf repeatedly, indeed almost exclusively, in Texas. Instead, she chose to act in Texas and the district court properly found that it had jurisdiction over the Estate as a result. The case was litigated in the district court, ultimately resulting in a judgment on liability and a jury verdict on damages. The Fifth Circuit, applying an amorphous inquiry and holding that physical presence was not relevant, upset the settled judgment in this case, employing a test that will undoubtedly create greater uncertainty in circumstances that should be clear cut.

In addition to the aims of fairness and predictability, the Fifth Circuit's test also frustrates the principles of federalism in the Due Process Clause and elsewhere in the Constitution. As the Court recognized in *World-Wide Volkswagen*, to "remain faithful to the principles of interstate federalism embodied in the Constitution," state lines are fundamental to the jurisdictional inquiry. 444 U.S. at 293. Just as the "Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations,' " *id.* at 294 (quoting *International Shoe*, 326 U.S. at 319), it offends state sovereignty to rule that no recourse exists in a forum's courts when the activities giving rise to the litigation occur within that State.

IV. The Court of Appeals' Reversal of the District Court's Exercise of General Jurisdiction Fundamentally Conflicts with the Court's Jurisprudence

Liebreich is a citizen of Texas. She was personally served by hand in both her individual and representative capacity in Texas, within the forum district. She performed all her duties as personal representative in Texas, including "sign[ing] a retainer letter in Texas, receiv[ing] and distribut[ing] property from the Estate in Texas, and participat[ing] in decisions concerning the Florida litigation while she was in Texas" (16a).

The court of appeals' holding that the continuous presence of Liebreich within the forum state, in combination with personal service, and the Estate's substantial activities with the forum through Liebreich, does not confer general jurisdiction over Liebreich in her representative capacity (17a) directly conflicts with the Court's decisions.

In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Court held that it would not offend due process for Ohio to assert jurisdiction over a foreign corporation when the corporation conducted in Ohio "a continuous and systematic, but limited, part of its general business," and its president, an Ohio resident, was served there "while engaged in doing such business"—even though the litigation did not arise in or relate to Ohio. 342 U.S. at 438, 448. As in *Perkins*, the duties required of the personal representative of an Estate are "necessarily limited." Nonetheless, every action required of Liebreich occurred in the forum state "continuous[ly] and systematic[ly]."

Also as in Perkins, Liebreich was personally served at her home in Texas, from where she performed her representative activities. *See Burnham v. Superior Court*, 495 U.S. 604 (1990) (jurisdiction based on personal service of defendant in forum state satisfies due process). Although the defendant in *Burnham* was a natural person, *Perkins* also recognized the fairness of subjecting a corporation to a forum's jurisdiction on account of service upon "an authorized representative of a foreign corporation . . . physically present in the state of the forum and . . . engaged in activities appropriate to accepting service or receiving notice on its behalf . . . ." 342 U.S. at 444; *see also Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). Thus, the court of appeals' holding that due process is offended when a Texas court exercises general jurisdiction over an Estate's representative in the situation presented here reflects an unreasonably narrow view of a court's power over defendants, in conflict with the Court's seminal jurisdictional decisions, making certiorari appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 17, 2003

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40786
Filed July 22, 2003

D.C. Docket No. 6:00-CV-503

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellant

—v.—

DELL LIEBREICH, as personal representative of the Estate of Lisa McPherson

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Texas, Tyler.

Before:

KING, *Chief Judge*, and
DAVIS and BENAVIDES, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the judgment entered provides that costs on appeal are to be taxed against Religious Technology Center.

ISSUED AS MANDATE: August 27, 2003

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By: Rhoda Ferrara
Deputy
New Orleans, Louisiana

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40964
Filed July 22, 2003

D.C. Docket No. 6:00-CV-503

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellee

—v.—

DELL LIEBREICH, as personal representative of the Estate of Lisa McPherson

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Tyler.

Before:

KING, *Chief Judge*, and
DAVIS and BENAVIDES, *Circuit Judges*.

JUDGMENT

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ISSUED AS MANDATE: August 27, 2003

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By: Rhoda Ferrara
Deputy
New Orleans, Louisiana

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40783
Filed July 22, 2003
D.C. Docket No. 6:00-CV-503

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellee

—v.—

DELL LIEBREICH, Individually and as personal representative of the Estate of Lisa McPherson

Defendant-Appellant

THOMAS J. DANDAR; KENNAN G. DANDAR

Appellants

Appeal from the United States District Court
for the Eastern District of Texas, Tyler.

Before:

KING, *Chief Judge*, and
DAVIS and BENAVIDES, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the judgment entered provides that costs on appeal are to be taxed against Religious Technology Center.

ISSUED AS MANDATE: August 27, 2003

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By: Rhoda Ferrara
Deputy
New Orleans, Louisiana

Revised July 25, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40783
Filed July 22, 2003

RELIGIOUS TECHNOLOGY CENTER,

Plaintiff-Appellee,

—v.—

DELL LIEBREICH, Individually and as personal representative of the Estate of Lisa McPherson,

Defendant-Appellant,

THOMAS J. DANDAR; KENNAN G. DANDAR,

Appellants,

---

consolidated with
No. 02-40786

RELIGIOUS TECHNOLOGY CENTER,

Plaintiff-Appellant,

—v.—

DELL LIEBREICH, as personal representative of the Estate of Lisa McPherson,

Defendant-Appellee,

---

consolidated with
No. 02-40964

RELIGIOUS TECHNOLOGY CENTER,

Plaintiff-Appellee,

—v.—

DELL LIEBREICH, as personal representative of the Estate of Lisa McPherson,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

Before:

KING, *Chief Judge*,
DAVIS and BENAVIDES, *Circuit Judges*.

BENAVIDES, *Circuit Judge*:

This consolidated appeal arises from a breach of contract suit instigated by Plaintiff-Appellee-Cross-Appellant Religious Technologies Center (RTC) against the estate of Lisa McPherson (the Estate).[1] We find the district court lacked personal jurisdiction over the Estate, and we herein vacate the judgment of the district court.[2]

I.

A. *The Florida Wrongful Death Action*

In 1997, the Estate of Lisa McPherson filed a wrongful death action in state court in Tampa, Florida against various corporations and individuals affiliated with the Church of Scientology. Among those named in the complaint were the Church of Scientology, Flag Service Organization, Inc. (a corporation associated/affiliated with the Church of Scientology), and several individual Scientologists. Upon being served with the complaint,

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[1] RTC's motion to file a supplemental memorandum of law is granted.

[2] All three of the appeals at bar stem from rulings entered by the district court in the course of adjudicating the breach of contract claim, and consequently, the issue of personal jurisdiction is dispositive of all the issues presented to the Court in this appeal. Consequently, we confine our analysis to the question of personal jurisdiction.

and ostensibly as a cost-saving measure, Defendant Flag Service Organization (Flag) proposed to the Estate that they enter into an agreement to limit the number of Scientology-related corporate entities and individuals that would be named in the suit. The Estate and Flag consequently entered into a contract in which the Estate agreed to forego adding certain enumerated corporate defendants, and Flag agreed to forego encumbering its assets.

In 1999, the Estate moved the Florida court to add David Miscavige (the "worldwide ecclesiastical leader of Scientology") to the list of named defendants in its wrongful death action. Miscavige is the Chairman of the Board of RTC, a Scientology corporation, and while RTC was listed among the parties which the Estate was contractually bound to exclude from its action, the Estate sought to add Miscavige under the theory that it was not contractually precluded from adding Miscavige in his personal capacity. The Florida court was presented with the defendant-limiting contract between the Estate and Flag, and entered an interlocutory ruling that the contract did not prohibit the Estate from adding Miscavige as a defendant in his personal capacity.[3]

No appeal from the order in which the court permitted the Estate to add Miscavige in his personal capacity was attempted, nor was an appeal necessary in that on June 16, 2000, the Florida court granted Miscavige's motion to dismiss the complaint with respect to him due to insufficient service of process. Miscavige also sought attorneys' fees, and the Florida court denied Miscavige's

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[3] The order itself appears to be conditional. In ruling from the bench, the court stated, "[a]ll right. Subject to my ruling on the insufficiency of service of process issue, I will go ahead and rule that the 1997 agreement does not bar the plaintiff from trying to bring in Mr. Miscavige as an individual outside his capacity as an officer of RTC."

motion with respect to fees. Miscavige appealed the fee issue to the Florida appellate court. The Florida appellate court affirmed the trial court's ruling on the issue of attorneys' fees.

B. *The Breach of Contract Action*

While Miscavige's appeal of the attorneys' fee issue was still pending, RTC filed suit against the Estate for breach of the Estate-Flag defendant-limiting contract, and against Liebreich personally for tortiously interfering with the contract between the Estate and Flag. RTC filed in United States District Court in the Eastern District of Texas under a diversity of citizenship jurisdictional theory. RTC claimed standing as a third-party beneficiary of the Estate-Flag contract.

On the Estate's motion, the district court dismissed the tortious interference count against Liebreich for failing to state a claim. However, the district court denied the Estate's motion to dismiss RTC's breach of contract claim.[4]

The district court next entertained the parties' dispositive motions. The district court denied the Estate's motion for summary judgment, finding that it embodied only points of law which had already been addressed and rejected by the district court in passing upon the Estate's motion to dismiss. The district court also denied RTC's

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[4] The Estate moved to dismiss the breach claim for want of jurisdiction (subject matter and personal), for lack of capacity to be sued in Texas, for lack of standing, and for improper venue. The Estate also asked the district court to dismiss the action based on multiple abstention doctrines, a theory of litigation privilege, the doctrine of law of the case, and the Constitutional requirements of the Full Faith and Credit Clause. Finally, in rounding out its rather omnibus motion, the Estate asserted the defenses of waiver and estoppel. The district court rejected each of these theories of dismissal.

motion for partial summary judgment on the issue of liability, finding that the contract was ambiguous on the question of whether the contract precluded suit against Miscavige in his personal capacity, and consequently material facts were in dispute concerning liability.

RTC moved the district court to reconsider its motion for partial summary judgment. In support of its motion to reconsider, RTC attached extrinsic evidence which purported to demonstrate that the contracting parties intended Miscavige to be protected from suit in his personal capacity. In light of this evidence, the district court reconsidered its previous ruling and granted summary judgment in favor of RTC on the issue of liability.

The case then proceeded to trial on the issue of damages. The Estate proposed to offer the testimony of Liebreich to dispute the foreseeability of the damages incurred by RTC, under the theory that prior to adding Miscavige—the sole act of breach—Liebreich reasonably relied on the Florida court's order permitting Liebreich to add Miscavige, but the district court determined the evidence to be irrelevant and excluded it. RTC, on the other hand, was permitted by the district court to provide testimony concerning attorneys' fees incurred by RTC in moving to have Miscavige dismissed for want of service of process, and in aiding Miscavige in his quest to recover attorneys' fees from the Florida trial and appellate courts.

At the close of testimony, the Estate moved for a directed verdict asserting that RTC had failed to meet its burden at trial. The district court denied the motion from the bench. The Estate offered a proposed jury instruction regarding the prevailing market rate for attorneys' fees in Tampa, but the district court rejected the instruction. The jury returned a verdict for $258,697.10.

C. *Post-Trial Motions*

Upon completion of the trial the Estate filed a Rule 59 motion for a new trial, asserting, again, that the district court erred in failing to dismiss the action prior to trial and reasserting its previously adjudicated arguments that the district court lacked both personal and subject matter jurisdiction, that venue was improper, that the Estate enjoyed a litigation privilege immunity, that RTC lacked standing, and so forth. The Estate also chose to use its Rule 59 motion for a new trial to reassert its opposition to the district court's previous evidentiary rulings, jury instruction rulings, and the ruling denying a directed verdict. The district court summarily denied the Rule 59 motion. The Estate filed a notice of appeal.

RTC, on the other hand, moved to recover its costs and fees as a prevailing party pursuant to the Estate-Flag contract. RTC petitioned the district court for an award of $549, 015.84 in costs and fees for the litigation of this single-issue breach of contract case. The district court reduced the award to $327, 654.00.

RTC also moved the district court to impose sanctions pursuant to 28 U.S.C. § 1927 on the Estate's counsel, citing vexatiously repetitive motions and filings on the part of the Estate. The Estate responded with its own § 1927 motion for sanctions. The district court declined to sanction RTC's counsel, but the court did impose sanctions against the Estate's counsel for 30% of the attorneys' fees awarded, which totaled $98, 296.00. The Estate's counsel, Thomas and Kennan Dandar, (the Dandars) filed a second, separate, appeal of the imposition of § 1927 sanctions against them.

Finally, RTC filed a cross-appeal challenging the district court's decision to grant Liebreich's 12(b)(6) motion to dismiss the tortious interference claim. The

three appeals have been consolidated and are pending now before this Court.

II.

This Court reviews de novo the district court's determination regarding personal jurisdiction. *Central Freight Lines Inc. v. APA Transport Corp.*, 322 F.3d 376, 380 (5th Cir. 2003). To determine whether a federal district court sitting in diversity has personal jurisdiction over a nonresident defendant, the district court considers first whether exercising jurisdiction over the defendant comports with due process, and if due process is met, the district court turns to the extraterritorial jurisdictional rules of the state in which it sits to determine whether personal jurisdiction is conferred. *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 282 (5th Cir. 1988); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex.1990). Because the Texas Long Arm Statute is coextensive with the confines of due process, questions of personal jurisdiction in Texas are generally analyzed entirely within the framework of the Constitutional constraints of Due Process. *See Texas Long Arm Statute, Tex.Civ.Prac. & Rem.Code Ann.* § 17.041 (Vernon 2001) *et. seq.; Gessmann v. Stephens*, 51 S.W.3d 329, 335 (Tex.App. 2001); *Fernandez*, 844 F.2d at 282.

However, exercising personal jurisdiction over an estate which is probated in a foreign district presents particular jurisdictional problems. Usually when a court exercises jurisdiction over either a foreign or domestic estate the jurisdiction is *in rem*—that is, the court has jurisdiction over the property itself. Here, however, there is no question that the district court lacked in rem jurisdiction over the Estate. Instead, the contention here is that Liebreich, as the personal representative of the

Estate, created *in personam* jurisdiction over the Estate. There are two ways in which Liebreich might have brought the Estate into the reach of the district court, and both avenues have been presented to this Court. First, the district court found general jurisdiction over the Estate via Liebreich. Moreover, RTC argues that Liebreich created specific jurisdiction over the Estate. However, neither general nor specific jurisdiction existed over the Estate.

A. *General Jurisdiction*

The district court correctly found that it had general personal jurisdiction over Liebreich as a resident of Texas. However, the district court impermissibly imputed that general personal jurisdiction to the Estate. The district court stated that, "[t]here can be no doubt that as a resident of the State of Texas, Ms. Liebreich has had sufficient contacts with the state to confer general jurisdiction over her in this matter, both in her individual and representative capacities." Thus, the district court concluded that the general jurisdiction which a Texas court has over a Texas resident applies equally to a foreign estate whose representative lives in Texas. However, the district court is in error on this point.

General jurisdiction exists where a "defendant's contacts with the forum state are substantial and continuous and systematic but unrelated to the instant cause of action." *Central Freight Lines*, 322 F.3d at 381 (internal quotations omitted); *Helicoptieros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). The residency of a defendant in the forum state routinely creates such systematic and continuous contact. In the instant case, however, the defendant in question is not a resident of Texas. As a creature of the Florida probate regime, the Estate resides in Florida. Thus, for an estate probated

in a foreign jurisdiction to establish the type of continuous and systematic contact necessary for general jurisdiction, the representative of the Estate must have made those contacts in her representative capacity, on behalf of the Estate. It is not sufficient that the personal representative herself lives in Texas.

Here, despite the fact that Liebreich conducted some Estate business from her home in Texas, she did not establish systematic and continuous contact with Texas on behalf of the Estate such that general jurisdiction over the Estate was conferred. RTC argues that on behalf of the Estate Liebreich signed a retainer letter in Texas, received and distributed property from the Estate in Texas, and participated in decisions concerning the Florida litigation while she was in Texas. However, these sporadic Estate-related activities cannot be described as a part of a systematic and continuous stream of activities tying the Estate to Texas. None of the activities individually constitutes a substantial or meaningful contact with Texas, Texas law, or Texas residents, and certainly considered *in toto* they fail to amount to continuous and systematic contact with Texas such that general jurisdiction is created. *Compare*, *Central Freight Lines*, 322 F.3d 381(finding that general jurisdiction was lacking over corporate defendant, despite the fact that the defendant, "routinely arranges and receives interline shipments to and from Texas and apparently sends sales people to the state on a regular basis to develop business, negotiate contracts, and service national accounts . . . ."); *see also*, *Wilson v. Belin*, 20 F.3d 644, 649-51 (5th Cir. 1994) (finding no general personal jurisdiction over the defendant, despite the fact that defendant engaged in at least one professional legal project a year in Texas over the previous three years). Consequently, the district court erred in

concluding that it had general personal jurisdiction over the Estate.

B. *Specific Jurisdiction*

Although the district court relied on general personal jurisdiction over the Estate, RTC suggests that the district court also had specific jurisdiction over the Estate. Specific jurisdiction may be found when a foreign defendant "has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and *Helicopteros Nacionales*, 466 U.S. at 414) (internal citations omitted)). A single act may support specific jurisdiction where the act is directed at residents of the forum, and the cause of action relates to the act. *Burger King Corp.*, 471 U.S. at 476 n.18 (*citing McGee v. International Life Insurance Co.*, 355 U.S. 220 at 223 (1957)).

In the specific jurisdiction rubric, only those acts which relate to the formation of the contract and the subsequent breach are relevant. In support of its argument that specific jurisdiction exists, RTC points to the fact that Liebreich participated in negotiations concerning the Estate-Flag contract while in Texas, and the fact that Liebreich signed the Estate-Flag contract while in Texas. However, neither of these acts were directed at residents of the forum state, or at the forum state itself. While it is well established that "with respect to interstate contractual obligations . . . parties who reach out beyond one state and create . . . obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities," here, while contracting in the stead of a Florida resident,

Liebreich reached out *from* Texas to residents of Florida (Flag) and California (RTC). *Burger King*, 471 U.S. at 473. Therefore, the Estate did not direct its activities at the forum state.

Moreover, the physical location of Liebreich at the time she signed the agreement and participated in negotiations on behalf of the Estate is not especially relevant in the analysis.[5] The Supreme Court has rejected a formalistic rendering of minimum contacts, opting instead to look at the degree that a nonresident defendant has reached out and availed himself of the foreign venue. Here, in forming the contract, the Estate availed itself of the State of Florida and contracted exclusively with non-Texas residents. The Estate did not reach out to Texas, nor did it direct its contract-related activities toward Texas. It did not contract with Texas residents nor did it avail itself of Texas law in the formation of the contract. Therefore, the fact that Liebreich signed the contract in Texas does not, alone, support specific jurisdiction.

In sum, the district court lacked personal jurisdiction over the Estate. Liebreich's general jurisdiction cannot be imputed to the Estate, and the Estate did not establish minimum contacts relating to the breach action with the forum jurisdiction sufficient to support specific jurisdiction. Therefore, the district court erred in failing to dismiss the action against the Estate for want of jurisdiction.

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[5] Additionally, the presence of Liebreich in Texas lacks the significance that it might otherwise have, had she been acting on her own behalf, as she was at the time representing an entity whose "physical presence" was in Florida.

III.

For the foregoing reasons the judgment of the district court is vacated and the case is remanded for proceedings consistent with the renderings herein.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40783
Filed August 19, 2003

RELIGIOUS TECHNOLOGY CENTER,

Plaintiff-Appellee,

—v.—

DELL LIEBREICH, Individually and as personal representative of the Estate of Lisa McPherson,

Defendant-Appellant,

THOMAS J. DANDAR; KENNAN G. DANDAR,

Appellants,

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consolidated with
No. 02-40786

RELIGIOUS TECHNOLOGY CENTER,

Plaintiff-Appellant,

—v.—

DELL LIEBREICH, as personal representative of the Estate of Lisa McPherson,

Defendant-Appellee,

---

consolidated with
No. 02-40964

RELIGIOUS TECHNOLOGY CENTER,

Plaintiff-Appellee,

—v.—

DELL LIEBREICH, as personal representative of the Estate of Lisa McPherson,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Texas, Tyler

ON PETITION FOR REHEARING AND
REHEARING EN BANC

Before:

KING, *Chief Judge*,
DAVIS and BENAVIDES, *Circuit Judges*.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED except that we clarify that the sanctions award is vacated and not reversed. The vacatur of the sanctions award is appropriate in light of our determination that there is no jurisdiction against the Estate of Lisa McPherson. The district court can reconsider the sanction issue in light of said determination.

ENTERED FOR THE COURT:

[ILLEGIBLE]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40783
Filed August 19, 2003

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellee

—v.—

DELL LIEBREICH, Individually and as personal representative of the Estate of Lisa McPherson

Defendant-Appellant

THOMAS J. DANDAR; KENNAN G. DANDAR

Appellants

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consolidated with
02-40786

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellant

—v.—

DELL LIEBREICH, as personal representative
of the Estate of Lisa McPherson

Defendant-Appellee

---

consolidated with
02-40964

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellee

—v.—

DELL LIEBREICH, as personal representative
of the Estate of Lisa McPherson

Defendant-Appellant

Appeals from the United States District Court
for the Eastern District of Texas, Tyler

Before:

KING, *Chief Judge*,
DAVIS and BENAVIDES, *Circuit Judges*.

BY THE COURT:

IT IS ORDERED that the motion of appellee-cross-appellant, Religious Technology for clarification of this Court's July 22, 2003 decision is DENIED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40783
Filed August 19, 2003

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellee

—v.—

DELL LIEBREICH, Individually and as personal representative of the Estate of Lisa McPherson

Defendant-Appellant

THOMAS J. DANDAR; KENNAN G. DANDAR

Appellants

---

consolidated with
02-40786

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellant

—v.—

DELL LIEBREICH, as personal representative
of the Estate of Lisa McPherson

Defendant-Appellee

---

consolidated with
02-40964

RELIGIOUS TECHNOLOGY CENTER

Plaintiff-Appellee

—v.—

DELL LIEBREICH, as personal representative
of the Estate of Lisa McPherson

Defendant-Appellant

Appeals from the United States District Court
for the Eastern District of Texas, Tyler

Before:

KING, DAVIS and BENAVIDES,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for sanctions against Religious Technology Center is DENIED.

IT IS FURTHER ORDERED that appellants' motion for award of attorney fees is DENIED.

IT IS FURTHER ORDERED that appellants' alternative motion to remand the action to district court for imposition of sanctions, or decline the imposition of sanctions referring Liebriech and Thomas and Kennan Dandar to state probate proceedings is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed June 28, 2002

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

FINAL JUDGMENT ON § 1927 MOTION

The Court, having previously awarded $98,296.00, to Plaintiff against Thomas and Kennan Dandar, personally, as a portion of the attorneys' fees reasonably incurred by Plaintiff in response to vexatious conduct on the part of Defense Counsel, pursuant to 28 U.S.C. § 1927, hereby enters this Final Judgment against Thomas and Kennan Dandar, jointly and severally, in the amount of $98,296.00 with post judgment interest at 1.732 percent from the date of this judgment until paid.

SIGNED this 28th day of June, 2002.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed June 28, 2002

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

FINAL JUDGMENT ON ATTORNEYS' FEES

The Court, having previously found that Plaintiff is entitled to reasonable attorneys' fees as the prevailing party in its May 22, 2002 Order, hereby enters this Final Judgment in favor of Religious Technology Center against Defendant, Dell Liebreich, as Personal Representative of the Estate of Lisa McPherson, in the amount of $240,033.00[1] with post judgment interest at the rate of 1.732 percent from the date of this judgment until paid.

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[1] This amount is the sum of $229,358 in attorneys' fees and $10,675.00 in costs.

SIGNED this 28th day of June, 2002.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed June 28, 2002

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

ORDER

Before the Court is Defendant's Motion for Rehearing and Reconsideration of this Court's Order Entered May 22, 2002, Motion for Hearing and Motion for Sanctions Against Plaintiff's Counsel (doc. # 187). The Court believes that its recitation of the conduct of Defendant's counsel in filing numerous motions making arguments "repeated over and over again" after their merit was initially found lacking by the Court early in the litigation, coupled with the record, including Plaintiff's detailed listing of the meritless motions made by Defendant enumerated in Plaintiff's Motion for Sanctions under 28

U.S.C. § 1927, is sufficient to support the Court's finding that Defendant's counsel multiplied the proceedings "unreasonably" and "vexatiously." Further, the Court finds that Defendant's counsel had ample time and opportunity to request a hearing on Plaintiff's motion for sanctions and to reply to said motion. Accordingly, the Court believes that defense counsel have been provide due process. Defense counsel had ample time and opportunity to provide the Court with evidence of financial position. Such attempt at this point in the litigation is untimely. The Court further notes that Defendant's counsel throughout this litigation has been Dandar & Dandar and Kennan Dandar attended and participated in depositions early on in the litigation. Again, such arguments should have been presented to the Court in the Defendant's initial response to Plaintiff's motion and are untimely made.

Defendant presents no new arguments or newly discovered evidence showing the need to correct manifest errors of law or fact. Accordingly, it is the opinion of the Court that the motion is not well taken and should be DENIED.

IT IS SO ORDERED.

SIGNED this 28th day of June, 2002.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed May 22, 2002

RELIGIOUS TECHNOLOGY CENTER

—vs.—

DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

MEMORANDUM AND ORDER AWARDING COSTS INCLUDING ATTORNEYS' FEES

Before the Court is Plaintiff's Motion for Costs and Attorneys' Fees (doc. # 144). The court has considered Plaintiff's Motion and Memorandum of Law in Support, Supporting Affidavits, and Defendants' Response and Memorandum of Law, and the Plaintiff's Reply.

Under Paragraph 15 of the Confidential Agreement between the Defendant and the Church of Scientology Flag Service Organization, the prevailing party is entitled to attorneys' fees and costs in the event of a breach of the agreement. The court has previously found that

Defendant breached the agreement, as a matter of law, and the jury awarded Plaintiff damages for the breach which consisted of the major portion of attorneys' fees which were incurred by Plaintiff in defending the case Defendant brought against David Miscavige in violation of the Confidential Agreement.

Plaintiff requests a total of $549,015.84 in attorneys' fees and $44,136.00 in expenses and costs. Plaintiff also requests that these fees and costs be assessed against Plaintiff's attorneys, Thomas and Kennan Dandar, pursuant to 28 U.S.C. § 1927, due to the Dandars multiplying the proceedings unreasonably and vexatiously. Plaintiff submits evidence tending to show that the decision to sue Mr. Miscavige, in violation of the agreement between the parties, was made by Kennan Dandar, rather than by Dell Liebreich[1], the personal representative of the Estate of Lisa McPherson, and therefore, Plaintiff avers that the entire amount claimed should be awarded against the Dandars personally, rather than against their client, Dell Liebreich, in her representative capacity.

Defendant counters that Plaintiff, as a third party beneficiary of the contract, is not entitled to attorneys' fees under Florida law, that Plaintiff was required to prove all of its damages at the trial, and that Plaintiff's conduct in this case was not blameless and therefore, no award of fees against the Dandars is warranted pursuant to 28 U.S.C. § 1927. Defendant also argues that the attorneys' fees sought are excessive and that the witness fees are limited to $40.00 per day.

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[1] Plaintiff also avers that Dandar suborned perjury by having Ms. Liebreich testify at her deposition that she made the decision when later evidence indicates Kennan Dandar made the decision.

DISCUSSION

The court has reviewed the case law cited by Defendant to support her argument that a third party beneficiary is not entitled to attorneys' fees as a prevailing party. The cases cited are inapplicable to the facts in this case as they concern Florida statutory law concerning insurance cases. Obviously, Plaintiff is not basing its claim for attorneys' fees and costs on a Florida statute concerning insurance. Defendant has cited no authority that a third party beneficiary under a contract cannot recover attorneys' fees pursuant to that contract. Florida law, which governs this case, supports the right of a third party to enforce a contract made directly for its benefit and holds that a third party beneficiary is entitled to those rights created or duties imposed in its favor. *Shaffer v. Wells Fargo Guard Services*, 528 So. 2d 389 (Fla App. D3 1988), affirmed on reh. and review den. 534 So.2d 401 (Fla.). Therefore, it is clear that Plaintiff is entitled under the terms of the contract to recover attorneys' fees and costs as the prevailing party in this suit.

Attorneys' fees:

The calculation of attorney's fees involves a well-established process. First, the court calculates a "lodestar" fee by multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers. This process is identical under both Florida law and federal law. *See Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1146 (Fla. 1985) (adopting the federal lodestar approach for computing reasonable attorney fees); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir.1995).

The first step in determining the amount of attorneys' fees to award is to determine the compensable hours from the attorneys' time records, including only hours reasonably spent. *Florida Patient's Compensation Fund*, 472 So.2d at 1150. The second step is to select an appropriate hourly rate based on prevailing community standards for attorneys of similar experience in similar cases. *Id.* at 1151. The party seeking the fees has the burden of establishing the prevailing "market rate," *i.e.*, the rate charge in the community by lawyers of reasonably comparable skill, experience and reputation, for similar services. *Id.* The number of hours reasonably expended is then multiplied by the selected hourly rate to produce the "lodestar" amount. *Id.*

The court then considers whether the lodestar figure should be adjusted upward or downward depending on the circumstances of the case. *Id.* In making a lodestar adjustment the court should look to twelve factors, known as the *Johnson* factors, after *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974). The factors are: (1) the time and labor required for the litigation; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-19.[2]

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[2] The Supreme Court of Florida expressly adopted the standards set in *Johnson v. Georgia Highway Express, Inc.* in *Florida Patient's Compensation Fund*, 472 So.2d at 1150.

Four of the factors, novelty and complexity of issues, special skill and experience of counsel, quality of representation, and results obtain from the litigation, are subsumed in the initial lodestar calculation and should not be double counted. *Shipes v. Trinity Industries*, 987 F.2d 311, 320 (5th Cir.1993).

Compensable hours "reasonably spent":

The first step in determining the amount of attorneys' fees to award is to determine the compensable hours from the attorneys' time records, including only hours reasonably spent. The Plaintiff employed three law firms to represent it in this case. The firm of Paul Hastings Janofsky & Walker, LLP ("Paul Hastings") billed the Plaintiff for 550.7 hours, the firm of Jenkens & Gilchrist billed for 785.2 hours, and the firm of Sammons & Parker, local counsel, billed for 223 hours, a total of 1,558.9 hours.[3] Plaintiff has reduced the amount requested somewhat by subtracting various matters from the bills, for example the time the attorneys billed on the tortious interference claim and time which Mr. Rosen spent in trial as a witness rather than as counsel.

While the court agrees that a significant portion of the number of hours spent by Plaintiff's counsel on this simple breach of contract case was due to the repeated, frivolous arguments made by defense counsel in needless and pointless motions, the court does not accept that all of the hours billed were necessary. There was no need to have three law firms duplicating work on a simple case wherein the court found the liability issue on summary judgment for Plaintiff before trial. Numerous, overly zealous arguments were advanced by Plaintiff in need-

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[3] These figures are as of the filing of Plaintiff's Motion of April 4, 2002.

lessly voluminous fashion in response to weak, frivolous, and brief motions of Defendant. Also it appears there was much billing for conferences between attorneys at the different firms, rereading of pleadings by three differenct sets of lawyers, and some needless duplication. The court finds that the amount of time expended by counsel in conducting this litigation was not always reasonable and did not always reflected sound legal judgment under the circumstances. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)). The court finds that Plaintiff's counsel in this case, did not exercise sound 'billing judgment' with respect to all of the hours worked. 461 U.S., at 437, 103 S.Ct., at 1941. Accordingly, the court finds that the number of hours reasonably expended by Plaintiff's counsel in this case as follows: the Paul Hastings firm, 440 hours; the Jenkens and Gilchrist firm, 628 hours, and the Sammons & Parker firm 178 hours.

The "prevailing market rate:"

The party seeking the fees has the burden of establishing the prevailing "market rate," *i.e.*, the rate charge in the community by lawyers of reasonably comparable skill, experience and reputation, for similar services. *Id.* The hourly rates charged by the lead attorneys from each firm in this case range from $575.00 per hour for Mr. Samuel D. Rosen[4] of Paul Hastings, $450.00 for Mr. Charles A. Gall[5] of Jensen & Gilchrist, to $225.00 for Mr. Jack Walker[6] of Sammons & Parker. In addition,

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[4] Mr. Rosen's hourly fees rose during the pendency of this suit from $550.00 to $575.00.

[5] Mr. Gall's hourly fee rose twice during this case, from $375.00, to $410.00, to $450.00.

[6] "Mr. Walker's hourly fee rose from $200.00 to $225.00.

hourly rates billed to Plaintiff of associates and paralegals of these firms ranged from $110.00 to $400.00 per hour.

The court has reviewed the testimony during trial regarding prevailing market rates in the community, as well as affidavits submitted with Plaintiff's current motion. The court also takes notice of the Median Hourly Rates by Region for the year 2000 recently published by the Texas Bar Association.[7]

While the Plaintiff did produce evidence supporting the rates Mr. Rosen in this case, the evidence supporting the rates charged Mr. Gall or Mr. Walker consist of advertisements sent out on the internet regarding their firms, affidavits of interested parties, and/or resumes. While this evidence does tend to show a good deal of experience and expertise on the part of Mr. Gall and Mr. Walker, there is insufficient evidence as to the "prevailing market rate" for attorneys of their degree of training and experience. Resumes of some associates, such as Jeffrey Crouch, are also included, but again, there is no objective evidence of the "prevailing market rate" for an attorney of this degree of training and experience. Only affidavits from interested parties is provided concerning these attorneys and various unnamed junior associates and paralegals. The court finds the Plaintiff has failed to supply sufficient objective evidence to show that the rates billed by the Jenkens & Gilchrist and Sammons & Parker firm and for the associates in the Paul Hastings firm correspond with the "prevailing market rate" for attorneys, junior associates, and paralegals in this community, and are, therefore reasonable.

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[7] This survey found that the median hourly rate for the Dallas-Fort Worth area for 2000 was $190.00 per hour and for non-metropolitan counties, the median hourly rate was $150.00. "Texas Bar Journal," Vol. 65, Number 5, May 2002, page 482.

Accordingly, the Court finds the reasonable hourly rate for counsel in this case to be as follows: $500.00 per hour for the hours billed by Samuel Rosen of the Paul Hastings firm and $190.00 for associates[8] of that firm; $400.00 the billable hours of Charles Gall from the Jenkens & Gilchrist firm, and $190.00 for associates[9] of that firm; and $195.00 for the Sammons & Parker firm.

Next the Court must multiply the number of hours reasonably spent by the reasonable rate.

The Court finds that of the hours billed by Samuel Rosen, of the Paul Hastings firm, 198 hours were reasonably expended by for Mr. Rosen at $450 per hour. The Court further finds that an additional 242 hours were spent by associates of the Paul Hastings firm at a reasonable rate of $190 per hour[10], giving a total award for the work of the Paul Hastings firm in the amount of $144,980.00.

The court finds that of the hours billed by Charles Gall of the Jenkins & Gilchrist firm, 136.4 hours were reasonably spent at $400.00 per hour. The Court finds that the firm of Jenkins & Gilchrist reasonably spent an additional 491.6 hours of associates time, at a prevailing market rate of $190.00 per hour. This results in an award of $147,964.00 in attorneys' fees for the work done by the Jenkins & Gilchrist firm.

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[8] This rate is based largely upon the well know high cost of living and wages in New York City, where the Paul Hastings firm is located.

[9] This rate is based upon the fact that most of the work done by associates of this firm was done by Jeffrey Crouch, an senior attorney of considerable experience.

[10] The Court was provided with no evidence as to the "prevailing market rate" of the work done by the associates of the Paul Hastings firm.

The court finds that the Sammons and Parker firm reasonably expended 178 hours at a prevailing market rate of $195.00 per hour, resulting in an award for the work done by that firm in the amount of $34,710.00.

Thus, calculation of the lodestar amount results in a total $327,654.00.[11] The court finds no reason to adjust the lodestar amount either upwards or downwards.

The three law firms include litigation expenses as part of their request for attorneys' fees and costs under the prevailing party clause of the contract. The court finds that the litigation expenses sought do not fall within the contract language under consideration and, therefore, are not recoverable.

Costs:

The court finds Plaintiff's documentation of its costs to be sufficient to justify an award of the total amount sought and therefore awards to Plaintiff $10,675.00 in costs.

Plaintiff's 28 U.S.C. § 1927 request:

The court finds that Plaintiff's request to have Defendant's attorneys sanctioned pursuant to 28 U.S.C. § 1927 is well taken in part. These proceedings were unnecessarily and vexatiously multiplied by arguments repeated over and over again by the defense after their merit was initially found lacking by the court early in the litigation. The court finds the conduct of Thomas and Kennan Dandar in filing these repeated, frivolous motions to be both unreasonable and vexatious. However, the Court also finds that Plaintiff's litigation posture in this case

[11] $144,980.00 for Paul Hastings firm; $147,964.00 for the Jenkens & Gilchrist firm; and $34,710.00 for the Sammons & Parker firm.

was overzealous and that Plaintiff advanced strident and specious arguments in its characteristic "overkill" mode of conducting this litigation. This action was also was vexatious and unnecessarily complicated this case. Accordingly, the court orders that 30% of the attorneys' fee award to be paid by Thomas and Kennan Dandar as a sanction for their unreasonable and vexatious conduct.

CONCLUSION

IT IS ORDERED

that Plaintiff is awarded $327,654.00 in attorneys' fees, $98,296.00 of which is to be paid by Thomas and Kennan Dandar personally pursuant to 28 U.S.C. § 1927 as a sanction for their vexatious conduct which unnecessarily complicated this case.

that Plaintiff is awarded $10,675.00 in costs.

SO ORDERED this 22nd day of May, 2002.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed March 6, 2002

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

FINAL JUDGMENT

This action came on trial before the Court and a jury. The issues have been duly tried and the jury has duly rendered its verdict. It is therefore ORDERED and DECREED that Plaintiff is awarded $258,697.11 pursuant to the jury's verdict, plus $49,955.76 in prejudgment interest. Post judgment interest, to be calculated at the rate of 2.28%, is awarded from the date of this judgment until paid. Plaintiff is awarded costs pursuant to 28

U.S.C. § 1920 to be taxed by the Clerk of this Court.[1] It is further ORDERED that all relief not previously granted is denied.

SIGNED this 4th day of March, 2002.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

[1] Plaintiff shall submit a detailed, itemized record of its costs, with documentation, within thirty (30) days, with a copy to Defendant. Defendant shall have twenty (20) days to file any objection.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed March 20, 2001

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

ORDER

Before the Court is the Plaintiff's Motion for Leave to File Amended Complaint (doc. #59). After review of the motion, it is the opinion of the Court that the motion is not well taken and should be DENIED.

SIGNED this 19th day of March, 2001.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed March 19, 2001

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, individually and DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

ORDER OF SUMMARY JUDGMENT

Before the Court is Plaintiff's Motion for Reconsideration of January 8, 2001 Order Denying Partial Summary Judgement or, Alternatively, Plaintiff's New Motion for Partial Summary Judgment Based Upon Recent Deposition Admissions brought by Plaintiff, Religious Technology Center (doc. # 44) and Defendant's Motion for Summary Judgment (doc. #32).

Plaintiff seeks partial summary judgment on the issue of liability on its claim for breach of contract. Defendant

reargues several issues of law on which the Court has previously ruled and provides no authority which requires a revisit of those issues.

BACKGROUND

The dispute in this case arises out of the Confidential Agreement which was entered into in November, 1997, between Dell Liebreich, as Personal Representative of the Estate of Lisa McPherson, and the Church of Scientology Flag Service Organization. The agreement relates to the wrongful death litigation brought by the Estate against The Church of Scientology, d/b/a Church of Scientology Flag Service Organization, Inc., Case No 97-01235 in the Florida State courts. The gist of the agreement is that the Church of Scientology agreed not to "transfer, encumber or otherwise alienate its interest in any of its real estate holdings, so that it retains sufficient real property to satisfy a potential judgment, if any, in the state court action" in return for the agreement of Dell Liebreich, as Personal Representative of the Estate of Lisa McPherson, to forego the intended amendment of her state court action naming "Churches of Scientology related entities, and/or their individual officers and directors. . . ." The agreement listed a number of Scientology related entities and organizations and contained the catch-all phrase "any other Scientology related entities and any officer, director, agent, or employee of the above. . . ."[1]

In December, 1999 Liebreich filed a motion to amend the complaint and to add as a party defendant David Miscavige, Chairman of the Board of Religious Technology Center. Liebreich claims Miscavige was sued in

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[1] Confidential Agreement, paragraph 2.

his capacity as head of the Sea Organization, not as Chairman of the Board of Religious Technology Center, and that in this capacity he can be sued without breach of the Agreement between the parties. The Plaintiff disagrees, urging that there is only one reasonable interpretation of the agreement, and that is that Dell Liebreich agreed not to sue Mr. Miscavige in any capacity.

DISCUSSION

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Company*, 136 F.3d 455, 458 (5th Cir.1998). Issues of material fact are "genuine" only if they require resolution by a trier of fact and if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The Court has previously held that Plaintiff's filings failed to show that they were entitled to judgment as a matter of law and that issues of material fact existed. While Plaintiff argues that the contract language can only be interpreted to mean that Liebreich agreed not to sue Mr. Miscavige in any capacity, including his membership in the Book of the Month Club, the Court sees no reference to Mr. Miscavige in the contract nor is the

Sea Organization listed as one of the Scientology related "entities."[2]

Plaintiff argues that interpretation of the contract is strictly a question of law. However, it is clear that Plaintiff and Defendant have differing views as to the meaning of the all-inclusive nature of the agreement. "When a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties." *Bacardi v. Bacardi*, 386 So.2d 1201, 1203 (Fla. 3d DCA 1980).

Plaintiff has submitted additional evidence in support of its present motion reflecting upon the intent of the parties at the time the contract was agreed upon. The deposition of Defendant, Dell Liebreich, establishes the intention of the Defendant at the time she signed the agreement was that she agreed not to sue Mr. Miscavige.[3] Accordingly, it is clear that Defendant's intent at the time of the signing was, in fact, the same as Plaintiff's. Therefore, this evidence establishes that there is no material issue of fact as to whether Mr. Miscavige was meant to be included, in whatever capacity, in the contract's prohibition against adding "any other Scientology related entities and any officer, director, agent, or employee of the above."

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[2] The affidavit of Frank K. Flinn, submitted by Plaintiff as Exhibit "A" to Plaintiff's First Motion for Summary Judgment, describes the Sea Organization, not as an organization or a group of individuals acting in an organized capacity . . . but rather "is merely a way of describing members' spiritual commitment and undertaking to serve and advance the Scientology religious faith."

[3] Defendant's deposition, Plaintiff's Exhibit 5, at pages 131, 132, 133, and 135.

In addition to the Defendant's deposition testimony, Plaintiff has submitted a copy of a letter dated November 21, 1997, in the McPherson wrongful death case, from Defendant's attorney, Kennan G. Dandar, apparently to an attorney representing the Church of Scientology Flag Ship Organization. This letter states, "[a]fter conferring with my client, in order to prevent the addition of CSI, CST, and RTC, as well as David Miscavige, as party defendants in this action, we will need the following assurances" then goes on to ask for a $30,000,000 bond and other actions. This letter strongly confirms the nature of the agreement between the parties that Mr. Miscavige was not to be sued, even though he was not individually named in the agreement as drafted.

It is undisputed that there was a valid contract between the Church of Scientology Flag Ship Organization and Defendant. The court has previously held that Plaintiff, Religious Technology Center, was a third party beneficiary of the contract. There is no dispute that Defendant filed an amended pleading adding Mr. Miscavige as a party defendant in the McPherson wrongful death action. With the above evidence submitted by the Plaintiff, it is apparent that there is no issue of material fact as to whether or not this action was a violation of the agreement entering into between Defendant and the Church of Scientology Flag Ship Organization. Accordingly, Plaintiff has shown that it is entitled to summary judgment as a matter of law on the liability issue.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment (doc. # 44) is GRANTED;

IT IS ORDERED that Defendant's Motion for Summary Judgment (doc. # 32) is DENIED.

IT IS ORDERED that Mr. Miscavige submit an affidavit supporting his expenditure for attorney's fees on the McPherson wrongful death case within thirty (30) days along with a brief explaining how the fees requested in this case differ from those it sought in the Florida action pursuant to Florida Statute 57.105, the denial of which is currently being appealed. It is ORDERED that the fee statement distinguish the fees requested in the Florida action and the fees requested in this action.

SIGNED this 19th day of March, 2001.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed October 20, 2000

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, individually and DELL LIEBREICH, as Personal Representative of the ESTATE OF LISA MCPHERSON

ORDER

Before the Court is the Motion to Dismiss of Dell Liebreich, individually, and as Personal Representative of the Estate of Lisa McPherson. The motion argues several reasons for dismissal of this case, which the Court will address in turn.

BACKGROUND

This case arises out of events which occurred in the State of Florida. The Estate of Lisa McPherson was opened in Clearwater, Pinellas County, Florida after the death of Lisa McPherson. Dell LIEBREICH, defendant herein, was named by the Pinellas County Court as the personal representative of the estate. It is undisputed that the estate has no assets in Texas and that there is no ancillary estate in Texas. However, it is also undisputed that Dell LIEBREICH is a resident of the Eastern District of Texas, that Religious Technology Center is a resident of the State of California, and that the amount in controversy exceeds $75,000. Thus, Religious Technology Center claims this court has diversity jurisdiction over the parties.

The dispute arises out of the Confidential Agreement which was entered into between Dell Liebreich, as Personal Representative of the Estate of Lisa McPherson, and the Church of Scientology Flag Service Organization. The agreement relates to the wrongful death litigation brought by the Estate against The Church of Scientology, d/b/a Church of Scientology Flag Service Organization, Inc., Case No 97-01235 in the Florida state courts. The gist of the agreement is that the Church of Scientology agreed not to "transfer, encumber or otherwise alienate its interest in any of its real estate holdings, so that it retains sufficient real property to satisfy a potential judgment, if any, in the state court action" in return for the agreement of Dell Liebreich, as Personal Representative of the Estate of Lisa McPherson, to forego the intended amendment of her state court action naming "Churches of Scientology related entities, and/or their individual officers and directors. . . ." The agreement listed a number of apparently "Scientology related"

entities and organizations and contained the catch-all phrase "any other Scientology related entities and any officer, director, agent, or employee of the above. . . ."

In December, 1999 Liebreich filed a motion to amend the complaint and to add as a party defendant David Miscavige, a person the Scientology parties claim is Chairman of the Board of Religious Technology Center. Liebreich apparently disputes that Miscavige's exact connection to Scientology is as represented by RTC. At any rate, Liebreich claims she received court approval for the amendment from the court in Florida.

RTC brings suit alleging breach of contract against Liebreich as personal representative of the estate and for intentional interference with contract against Liebreich individually.

DISCUSSION

Rule 12(b)(1) Challenge:

Liebreich's first asserted ground for dismissal pursuant to Rule 12(b)(1) is that this court lacks subject matter jurisdiction. Defendant sets forth numerous theories in support of this assertion, but provides no evidence outside the pleadings in support of her arguments.

Attacks on subject matter jurisdiction come in two forms: (1) facial attacks, and (2) factual attacks. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.1980). A "facial attack" on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion. *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A "factual attack," however, challenges the existence of

subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered. *Id.*[1]

Defendant's attack on subject matter jurisdiction is a "facial attack" unsupported by testimony or affidavits. Dismissal under Rule 12(b)(1) requires a lack of this court's authority to hear and decide the dispute. In a diversity case, this requires a finding that the parties are not completely diverse and that the amount in controversy does not exceed $75,000.00. Defendant does not allege this as the grounds for her motion. Plaintiff has sufficiently alleged the basis of subject matter jurisdiction. The motion to dismiss pursuant to Rule 12(b)(1) is DENIED.

Rule 12(b)(2) Challenge:

Next, Defendant claims, pursuant to Rule 12(b)(2), that this case should be dismissed for lack of personal jurisdiction over Dell Liebreich, in both her representative and individual capacities. The essence of this argument is that the actions of Dell Liebreich, a Texas resident, acting in her capacity as personal representative for the estate of Lisa McPherson, and directed to the interests of the estate in Florida, can not form the basis of personal jurisdiction in this court. Liebreich points to well established authority that "[a]n administrator, appointed by the court of another state, may not be sued in the court of Texas nor act as the legal representative of the estate of (sic) Texas." *Strawder v. Thomas*, 846 S.W.2d 51 (Tex. App.-Corpus Christi. 1992) (citing *McAdams v. Capitol Prod. Corp.*, 810 S.W.2d 290, 293 (Tex. Civ. App.-Fort Worth 1991, writ denied.) See also

[1] "When alleged jurisdictional facts are disputed, we must resolve all conflicts in favor of the party seeking to invoke the court's jurisdiction." *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir.1990).

Faulkner v. Reed, 241 S.W. 1002, 1007 (Tex. Comm. App. 1922, judgm't. adopted); *Eikel v. Burton*, 530 S.W.2d 907, 908 (Tex. Civ. App.-Houston [1st Dist] 1975, writ ref'd n.r.e.); *Minga v. Perales*, 603 S.W.2d 240 (Tex. App.-Corpus Christi 1980, no writ).

In *Faulkner*, the court said that the administrator appointed by the courts of Ohio could not by virtue of that appointment sue or be sued in the courts of Texas, or in any way act as legal representative of the Ohio estate in Texas. "An administrator is the agent solely of the court appointing him, clothed with authority to administer only such assets as are within the jurisdiction of the court making such appointment. In other words, an administrator has no extraterritorial authority." *Faulkner v. Reed*, 241 S.W. at 1007.

RTC counters that the above rule is not pertinent to the case at bar because the reasoning underlying the above rule does not apply. The reasoning underlying this rule is that an administrator has authority only over such assets as are within the jurisdiction of the court appointing him and that there is a public policy of non-interference with the domiciliary state's orderly administration of the estate. RTC asserts that neither of these reasons is implicated by this court's exercise of jurisdiction over Liebreich. RTC points out that this suit is not an *in rem* action involving administration of the estate's assets. RTC is seeking to hold the Estate liable for breach of an agreement the Estate entered into through Liebreich rather than seeking a determination of its rights to Estate assets. It claims it is not asking this court to interfere with the Florida probate proceeding.

RTC cites *Milam v. Sol Newman Co.*, 205 F. Supp. 649, 651-53 (N. D. Ala. 1962) in support of its position. The court in *Milam* asked two questions: 1.) whether the present action against the fiduciary on a claim arising

from the decedent's acts in the forum state is really an interference with the domiciliary administration, and 2.) whether such an action is really of an *in rem* character. Following this reasoning, we agree with RTC that the present action against the estate's administrator is not an interference with the Florida administration of the McPherson estate. Secondly, it is obviously not an action of an *in rem* character. This conclusion is supported by *Morris v. Jones*, 329 U.S. 545, 67 S. Ct. 451, 91 L.Ed. 488 (1947) in which the Supreme Court remarked:

> We are not dealing here with any question of priority of claims against the property of the debtor. For in this proceeding petitioner is not seeking, nor is respondent denying him, anything other than the right to prove his claim in judgment form. * * * Nor do we have here a challenge to the possession of the liquidator either through an attempt to obtain a lien on the property or otherwise.
>
> 329 U.S. at 548-550, 67 S. CT. at 454, 455.

It is undisputed that Dell Liebreich is a resident of Texas. RTC claims that Dell Liebreich was in Texas when the negotiation of this agreement took place and that she executed the agreement in Texas as representative of the estate. RTC also claims that numerous other acts and duties in the representative capacity were performed by Ms. Liebreich while residing in Texas. Defendant does not dispute these factual allegations. RTC asserts that this physical presence plus the enumerated actions establish personal jurisdiction over Dell Liebreich both in her individual capacity and representative

capacity.[2] The Court agrees. There can be no doubt that as a resident of the State of Texas, Ms. Liebreich has had sufficient contacts with the state to confer general jurisdiction over her in this matter, both in her individual and representative capacities. Accordingly, Defendant's Motion to Dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction is DENIED.

Rule 12(b)(3) Challenge:

Next, Defendant asserts that the action should be dismissed pursuant to Rule 12(b)(3) for improper venue. The purpose of the federal venue provision, like the jurisdictional requirements, is to protect the defendant from having to defend a suit in an unreasonably burdensome forum. 28 U.S.C. § 1391 governs choice of venue in diversity cases.

> § 28 U.S.C. 1391(a) states in relevant part:
>
> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

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[2] While noting that RTC has submitted various exhibits outside the pleadings in support of its response, the Court has not considered them. Thus there is no need to convert this Rule 12(b)(2) Motion to Dismiss into a Rule 56 Motion for Summary Judgment.

The statute was amended in 1990 in order to broaden the venue provisions. The commentary following the 1990 revisions to § 1391(a)(2) states:

> The fact that substantial activities took place in district B does not disqualify district A as proper venue as long as "substantial" activities took place in A, too. Indeed, district A should not be disqualified even if it is shown that the activities in district B were more substantial, or even the most substantial. Any other approach would restore the pinpointing problem that created the difficulties under the now discarded "claim arose" standard. If the selected district's contacts are "substantial," it should make no difference that another's are more so, or the most so.

David D. Siegel, Commentary on the 1988 and 1990 Revisions of Section 1391, Subdivision (a), Clause (2), 28 U.S.C.A. § 1391 (1993).

It is clear that substantial activities giving rise to the claim occurred in the State of Texas. Thus venue is proper under 28 U.S.C. § 1391(a)(2). Alternatively, should venue not be correct under that section, it would clearly be proper under 28 U.S.C. § 1391(a)(3). Defendant's Motion to Dismiss for Improper Venue is DENIED.

Rule 12(b)(6) Challenge:

Defendant asserts that RTC has failed to state a claim upon which relief can be granted because, according to the law of the State of Florida, Dell Liebreich does not have any individual liability for the alleged breach of contract. She claims that Florida's economic loss rule bars Plaintiff's claim and that because no third party was involved in the alleged tortious action, Plaintiff has failed to state a claim.

To sustain a motion to dismiss, it must appear to a legal certainty that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Worsham v. City of Pasadena*, 881 F.2d 1336, 1339 (5th Cir. 1989). The a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed2d 1358 (1983). "Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." 2A *Moore's Federal Practice*, ¶ 12.07 [2. -5] at 12-91.

In evaluating a 12(b)(6) motion, we must not go outside the pleading, we must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the plaintiff. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) *cert. denied*, 459 U.S. 1005, 103 S. Ct. 729, 74 L.Ed. 2d 953 (1983).

On substantive issues, the *Erie* doctrine requires federal courts in diversity actions to apply state law as the "rule of decision." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79, 58 S. Ct. 817, 822-23 (1938). Choice of law rules are deemed "substantive" for *Erie* purposes. Therefore, we will apply the same choice of law rules that a Texas state court would apply in determining whether or not Plaintiff has stated a claim. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941). When an action is in tort, the law of the place where the tort occurred governs. *See Sawyer v. El Paso & N.E. Ry. Co.*, 49 Tex. Civ. App. 106, 114, 108 S.W. 718, 723 (1908). When the action involves a contract issue, the law of the state where the contract is made, or where performance begins, or where the performance is

to take place is applied. The basis of both the tort and contract claims is the filing in the Florida court of the amended complaint adding David Miscavige. Therefore, it is apparent that both the tort and contract claims are governed by Florida law.

Defendant claims that the economic loss rule bars any recovery against Dell Liebreich for any tort claim. We will not address this argument because we find that Defendant's second argument is dispositive of the Rule 12(b)(6) motion.

The question presented is whether RTC has stated a claim for the tort of interference with contract under Florida law. Defendant asserts that she cannot be held liable for interference with a contract in her individual capacity because when an agent of an entity is acting within her capacity and scope as an agent, she cannot be considered to be a separate entity outside of the contractual relationship who can interfere with that contract. *Abruzzo v. Haller*, 603 So. 2d 1338,1339-40 (Fla 1st DCA 1992). *Abruzzo* held:

> to maintain an action for tortious interference with contractual rights, a plaintiff must prove that a third party interfered with a contract by 'influencing, inducing or coercing one of the parties . . . to breach the contract, thereby causing injury to the other party.' An agent of a corporate party to a contract, acting within his capacity and scope as an agent, cannot be considered to be a separate entity outside of the contractual relationship which can tortiously interfere with that relationship.

Id. See also *Cedar Hill Properties, Corp. v. Eastern Federal, Corp.*, 575 So.2d 673, 676 (Fla. 1st DCA 1991) (quoting *West v. Troelstrup*, 367 So.2d 253, 255 (Fla. 1st DCA 1979)). In *Abruzzo* an associate of a law firm

attempted to sue one of the partners of that law firm for tortious interference with the associate's contract with the law firm. The court held that the law partner was not a third party who could interfere with the contract of his principal, the law firm.

The Court agrees with Liebreich that she cannot be considered a third party who influenced, induced or coerced the estate to breach the contract. Plaintiff's complaint does not contain a direct or inferential allegation of one of the essential elements of the tort of interference with contract. Accordingly, the Court finds that RTC has failed to state a claim against Liebreich in her individual capacity. Defendant's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted is well taken and should be GRANTED.

Next, on the breach of contract claim, Defendant asserts that RTC has failed to state a claim because RTC was not a party to the contract. On this argument, Plaintiff prevails. It is well established law in Florida that a person who is not a party to a contract has standing to sue on that contract if it was made for that person's benefit. *Camp, Dresser & McKee, Inc. v. Howard Co.*, 721 So.2d 1254 (Fla 5th DCA 1998); *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028 (Fla. App. 4th DCA 1994). It is clear that RTC, as an acknowledged Scientology organization is a third party beneficiary of the contract. Accordingly, Defendant's 12(b)(6) motion is DENIED on the contract claim brought against Liebreich in her representative capacity.

Forum non conveniens, 28 U.S.C. § 1404(a) claim:

Further, Defendant's Motion to Transfer Venue based upon a claim of *forum non conveniens* is unsupported by the facts. Defendant has submitted no affidavits or other

proof containing any factual statements supporting her grounds for requesting a transfer. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1549-50 (5th Cir. 1991). Because Dell Liebreich, the only person being sued, is a resident of the Eastern District of Texas, the court is hard pressed to see how this forum is inconvenient for Defendant. Thus the Motion to Transfer Venue is DENIED.

CONCLUSION

For the above reasons,

IT IS ORDERED that the Motion to Dismiss of Defendant Dell Liebreich brought under Rule 12(b)(1),(2), and (3) is DENIED.

IT IS ORDERED that the Motion to Transfer Venue is DENIED.

IT IS ORDERED that the Motion to Dismiss Defendant Dell Liebreich in her representative capacity for the breach of contract claim, brought under Rule 12(b)(6), is DENIED.

IT IS ORDERED that the Motion to Dismiss Defendant Dell Liebreich in her individual capacity for the tort of interference with contract, brought under Rule 12(b)(6), is GRANTED.

SIGNED this 20th day of October, 2000.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:00 CV 503
Filed September 18, 2003

RELIGIOUS TECHNOLOGY CENTER

—VS.—

DELL LIEBREICH, as Personal Representative
of the ESTATE OF LISA MCPHERSON

ORDER

In accordance with the directions of the United States Court of Appeals for the Fifth Circuit,

IT IS ORDERED that Plaintiffs' renewed Motion for Sanctions and Attorney Fees, Pursuant to 28 U.S.C. § 1927, Upon Remand (doc. # 211) is DENIED.

IT IS ORDERED that the Court's previous Sanctions Order is VACATED.

IT IS FURTHER ORDERED that the Motion for Release of Cash Bond brought by Thomas Dandar and Kennan

Dandar (doc. # 210) is GRANTED. Accordingly, the Clerk of the Court is directed to return to the Defendant the bond or funds Defendant or Defendants' counsel deposited into the Registry of this Court by forwarding said funds to the Thomas and Kennan Dandar at P.O. Box 24597, Tampa, Florida 33623-4597.

IT IS FINALLY ORDERED that this case DISMISSED for want to jurisdiction.

SIGNED this 18th day of September, 2003.

JOHN HANNAH, JR.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE